IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. ~~225~~ 9

NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

WILLIAM H. JOHNSON, JULIA T. KLOSEK AND ALBERT AVERY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONERS

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No. 528

NACIREMA OPERATING CO., INC. AND LIBERTY MUTUAL INSURANCE COMPANY,

Petitioners,

v.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported in 398 F. 2d 900 (A. 42).[1] The opinion of the United States District Court for the District of Maryland is reported in 243 F. Supp. 184, 1965 A.M.C. 1825 (A. 11). The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, is reported in 245 F. Supp. 51, 1965 A.M.C. 2231 (A. 35).

[1] The designation "A" refers to the separate Appendix.

JURISDICTION

The judgments of the Court of Appeals for the Fourth Circuit in consolidated cases Nos. 528 and 663 were entered June 20, 1968 (A. 65, 66, 67). The petition in No. 528 was filed September 16, 1968. On September 9, 1968, by order of Mr. Justice Black, the time within which to file a petition for a writ of certiorari in No. 663 was extended to and including October 18, 1968. The petition in No. 663 was filed on October 17, 1968. The petitions in Nos. 528 and 663 were granted December 9, 1968. The jurisdiction of this Court is invoked under 28 U.S.C.A., §1254 (1).

STATUTES INVOLVED

The statutes involved are:

1. Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C.A., §903(a):

> "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—
>
> (1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or
>
> (2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof."

2. Admiralty Extension Act of 1948, 46 U.S.C.A., §740:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of

damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

"In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided,* That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage."

QUESTIONS PRESENTED

1. Whether an injury sustained by a longshoreman while working on a pier is one which occurred upon the navigable waters of the United States and is thus within the coverage of the Longshoremen's & Harbor Workers' Compensation Act.

2. Whether the Admiralty Extension Act of 1948 broadens the jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act to include injuries sustained while working on the land.

STATEMENT OF THE CASE

These consolidated cases arose out of pier injuries to three longshoremen, one of whom died, in accidents occurring under almost identical circumstances. The jurisdiction of the district courts was invoked under 33 U.S.C.A., Sec. 921(b) as all three accidents involved compensation

claims and a review of separate compensation orders in which the deputy commissioners held the claims were not covered by the Longshoremen's Act.

William H. Johnson and Joseph J. Klosek, longshoremen, employees of Nacirema Operating Co., Inc., were working in a gondola car on the Bethlehem Steel High Pier, Sparrows Point, Maryland, as members of a gang of longshoremen engaged to load steel beams aboard the SS BETHTEX on November 14, 1963. As "slingers" it was their job to secure beams stowed in the car to a fall attached to one of the ship's cranes so that the drafts could be picked up and loaded into the vessel's holds. At approximately 4:15 p.m., a draft which was raised swung, knocked Klosek out of the car onto the pier and pinned Johnson against the side of the car. Klosek died some hours later as a result of the injuries he sustained.

Similarly, Albert Avery, a longshoreman in the employ of Old Dominion Stevedoring Co., insured by Liberty Mutual Insurance Company, was working in a gondola car on Pier B, City Piers, Norfolk, Virginia, on December 28, 1961. Avery, like Johnson and Klosek, was a "slinger" and was engaged in hooking ship's gear to a draft of logs. He was injured when the draft struck him and crushed him against the side of the car.

The Johnson and Klosek cases were heard simultaneously by Deputy Commissioner John P. Traynor, Fourth Compensation District, as the injuries and death resulted from the same accident. In separate compensation orders Deputy Commissioner Traynor rejected the two claims under the Longshoremen's Act, stating that neither the employment nor the injuries sustained took place upon the navigable waters of the United States (A. 2, 5).

Appeals from the two compensation orders of Deputy Commissioner Traynor were argued together in the United States District Court for the District of Maryland and the orders were affirmed. (*Johnson v. Traynor*, 243 F. Supp. 184 [D. Md. 1965]; A. 11). The district judge agreed that the accidents had not occurred upon navigable waters and further found that the jurisdiction of the Longshoremen's Act had not been extended by the Admiralty Extension Act of 1948.

Deputy Commissioner Jerry C. Oosting entertained the claim for compensation benefits in the Albert Avery case upon a stipulation of the facts and by formal order rejected the claim assigning as his reason therefor that the injury sustained by the claimant did not occur on the navigable waters of the United States within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (A. 9).

Thereafter, the claimant appealed the decision of the Deputy Commissioner to the United States District Court for the Eastern District of Virginia, Norfolk Division. The District Court affirmed the decision of the Deputy Commissioner determining that inasmuch as the injury occurred on a pier, an extension of the land, it did not occur upon the navigable waters of the United States. The District Court further decided that the Admiralty Extension Act of 1948 was inapplicable and that it did not extend the jurisdiction of the Longshoremen's Act, (*East v. Oosting*, 245 F. Supp. 51 [E.D. Va. 1965]; A. 35).

The three cases, Johnson, Klosek and Avery, were appealed. The court below after first having heard the cases in separate panels felt the questions involved were of suffi-

cient importance to warrant being heard by the entire court. Of its own motion, therefore, reargument en banc was ordered by the court, the cases were consolidated for rehearing together with one other case for which no petition for certiorari was sought, and the cases were reargued together. In a 5-2 decision, the court below reversed the judgments of the district courts.

Subsequently, in No. 528, counsel for Nacirema Operating Company and Liberty Mutual Insurance Company applied to this Court for certiorari and the Solicitor General, on behalf of the Deputy Commissioners, likewise applied for certiorari. The petitions were granted, the cases were consolidated and are thus before the Court.

SUMMARY OF ARGUMENT

Piers have without exception been held to be extensions of the land; therefore, a pier injury cannot under any circumstances have occurred "upon the navigable waters of the United States", as required by Section 3 of the Longshoremen's Act (33 U.S.C.A., Sec. 903(a)). *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *Hastings v. Mann*, 340 F. 2d 910 (4th Cir. 1965), *cert. den.*, 380 U.S. 963 (1965).

Until the decision below, no court has ever held that pier injuries are covered by the Longshoremen's Act. This Court very recently denied certiorari in three cases, arising in the Fifth and Ninth Circuits, which reached the precise opposite result from that of the Fourth Circuit. *Travelers Ins. Co. v. Shea*, 382 F. 2d 344 (5th Cir. 1967), *cert. den.*, 389 U.S. 1050 (1968) *sub nom., McCollough v. The Travelers Ins., Co.; Nicholson v. Calbeck*, 385 F. 2d 221 (5th Cir. 1967), *cert. den.*, 389 U.S. 1051 (1968), and *Houser*

v. O'Leary, 383 F. 2d 730 (9th Cir. 1967), *cert. den.*, 390 U.S. 954 (1968).

The legislative history of the Longshoremen's Act also refutes the lower court's holding that the Act is "status" oriented (that is, related to the job, or the contract) rather than "situs" oriented (related to the location of the injury). Though there were certainly proponents of the idea that the Act should cover all water front workmen for injuries sustained during the course of their employment, the Act did not so provide when passed. The distinct understanding of the legislature was clearly stated in Senate Report No. 973, 69th Congress, 1st Session, p. 16:

> ". . . injuries occurring in loading or unloading are *not* covered unless they occur on the ship or between the wharf and the ship. . . ." (Emphasis supplied.)

Even though the Act is a humanitarian act, and though it might be felt desirable for it to provide as the longshoremen contend, "the power to change the statute is with Congress . . .", not the courts. *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200 (1952).

Though the court below suggests that the Admiralty Extension Act of 1948, 46 U.S.C.A., Sec. 740, has extended the coverage of the Longshoremen's Act to land injuries, the plain language of the Extension Act and its legislative history negative such a conclusion. The Extension Act applies to *suits in rem* and *in personam*. Admiralty tort jurisdiction was thus extended to land if the injury was caused by a vessel. The Longshoremen's Act, on the other hand, is purely an administrative proceeding, a compensation act not concerned with damages, administered by the Deputy Commissioners in the Department of Labor in proceedings which begin by the filing of an administrative *claim* rather than a libel or complaint.

If there had been any intention on the part of the Congress to amend the Longshoremen's Act by the Extension Act, surely there would have been a cross-reference in one or the other of the acts, but none exists. And ten years after the passage of the Extension Act Congress noted its clear understanding that pier injuries are covered by state laws, while injuries occurring upon navigable waters of the United States are covered by the Longshoremen's Act. House Report No. 2287, *infra*, pp. 19, 20, provides in pertinent part:

> "[The Longshoremen's Act provides compensation for injuries to longshoremen and certain other water front workmen when they are working] *on the navigable waters of the United States,* including dry docks. *These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas."* (Emphasis supplied.)

That the Longshoremen's Act was never intended to embrace the broader area of admiralty jurisdiction is manifest in the deliberate substitution of the words "upon the navigable waters" for the words "within the admiralty jurisdiction" as originally proposed in 1927 when the Longshoremen's Act was enacted.

The area between navigable and unnavigable waters — clearly the separation point between Longshoremen's Act coverage and state coverage — referred to as the "twilight zone", has, through years of litigation since the passage of the Act in 1927, been narrowed to as precise an area as reason, logic and careful judicial interpretation will permit. If the decision of the court below is upheld, a veritable Pandora's box of litigation will ensue, totally nullifying the present, carefully drawn line circumscribing the twilight zone.

ARGUMENT

I.

A LONGSHOREMAN INJURED WHILE WORKING ON A PIER PERMANENTLY ATTACHED TO THE LAND IS NOT ENTITLED TO COMPENSATION UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT BECAUSE THE INJURY DID NOT OCCUR UPON THE NAVIGABLE WATERS OF THE UNITED STATES.

The jurisdiction of the Deputy Commissioner over claims for compensation granted by the Longshoremen's and Harbor Workers' Compensation Act (hereinafter called the Longshoremen's Act) contains a clear territorial limitation. His jurisdiction extends only to injuries occurring upon the navigable waters of the United States. The applicable section of the Longshoremen's Act is found in 33 U.S.C.A., Section 903(a), which provides in pertinent part:

> "(a) Compensation shall be payable under this Chapter in respect of disability or death of an employee, *but only if the disability or death results from an injury occurring upon the navigable waters of the United States* (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. . . ." (Emphasis supplied.)

Section 903(a) is the only source of jurisdiction of the Deputy Commissioner in the Longshoremen's Act. No other grant of such jurisdiction exists. Therefore, injuries which do not occur upon navigable waters are compensable only under state compensation laws.

It is not disputed that William H. Johnson and Joseph J. Klosek were working in a railroad gondola car on the Bethlehem Steel Company High Pier when they were struck by the draft. Similarly, Avery was working in a gondola car on a pier in Norfolk, Virginia. The piers in question extended from the land out over waters which

were once navigable and might still be navigable for small boats.

For over one hundred years this Court and every other court to which the question has been submitted have consistently held that piers such as the ones involved in this case are extensions of the land; that accidents occurring on them are not within the admiralty tort jurisdiction but are governed exclusively by state law. *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946); *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647 (1935); *T. Smith & Son, Inc. v. Taylor*, 276 U.S. 179 (1928); *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922); *Cleveland Terminal & Valley R.R. Co. v. Cleveland S.S. Co.*, 208 U.S. 316 (1908); *The Plymouth*, 70 U.S. (3 Wall.) 20 (1865); *Houser v. O'Leary*, 383 F. 2d 730 (9th Cir. 1967), *cert. den.*, 390 U.S. 954 (1968); *O'Keeffe v. Atlantic Stevedoring Co.*, 354 F. 2d 48 (5th Cir. 1965); *Michigan Mut. Liab. Co. v. Arrien*, 344 F. 2d 640 (2nd Cir. 1965), *cert. den.*, 382 U.S. 835 (1965); *Hastings v. Mann*, 340 F. 2d 910 (4th Cir. 1965), *cert. den.*, 380 U.S. 963 (1965); *Wiper v. Great Lakes Engineering Works*, 340 F. 2d 727 (6th Cir. 1965), *cert. den.*, 382 U.S. 812 (1965); *American Export Lines, Inc. v. Revel*, 266 F. 2d 82 (4th Cir. 1959); *O'Loughlin v. Parker*, 163 F. 2d 1011 (4th Cir. 1947), *cert. den.*, 333 U.S. 868 (1948); *Johnston v. Marshall*, 128 F. 2d 13 (9th Cir. 1942), *cert. den.*, 317 U.S. 629 (1942); 1 BENEDICT ON ADMIRALTY § 29 (6 ed.); GILMORE & BLACK, THE LAW OF ADMIRALTY § 6-46 (1957 ed.); ROBINSON ON ADMIRALTY § 11 (1939 ed.).

In *State Industrial Commission v. Nordenholt Corp.*, 259 U.S. 263 (1922), this Court held that a longshoreman who was injured while unloading a vessel lying in navigable waters when he slipped and fell on the dock, had been injured on the land and that recovery for such an injury was therefore governed by the state workmen's compensation

act rather than by the general maritime law. And in *T. Smith & Son, Inc. v. Taylor,* 276 U.S. 179 (1928), a longshoreman, working on a stage on the dock which projected over the water to or near the ship, was struck by a sling load of cargo, knocked into the water and subsequently found dead. The Court held that the impact of the sling, which caused the death, occurred on the pier, which is an extension of the land; therefore, it was proper for the widow of the decedent to be awarded compensation under the state law.

Consequently, injuries sustained on a pier are not covered by the Longshoremen's Act since they did not occur upon navigable waters. This Court so held in *Swanson v. Marra Bros., Inc.,* 328 U.S. 1 (1946), a landmark decision which has never been questioned to this day. Swanson was a longshoreman working on a pier loading cargo on a ship lying alongside and was injured when a life raft fell from the vessel and struck him. The question before the Court was whether he had a right of action against his employer under the Jones Act while he was working on shore. This Court was therefore called upon to interpret the relationship of the Longshoremen's Act and the Jones Act and it did so in the following language (328 U.S. 1, 7):

> "We must take it that the effect of these provisions of the Longshoremen's Act is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the *Longshoremen's Act. But since this act is restricted to compensation for injuries occurring on navigable waters, it excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore.* The act leaves the injured employees in such cases to pursue the remedies afforded by the local law, which this Court has often held permits re-

> covery against the employer for injuries inflicted by land torts on his employees who are not members of the crew of a vessel." (Emphasis supplied.)

The United States Courts of Appeal for the Fifth and Ninth Circuits have recently held that pier injuries are not covered by the Longshoremen's Act. *Travelers Ins. Co. v. Shea*, 382 F. 2d 344 (5th Cir. 1967), *cert. den.*, 389 U.S. 1050 (1968) *sub nom., McCollough v. The Travelers Ins. Co.*; *Nicholson v. Calbeck*, 385 F. 2d 221 (5th Cir. 1967), *cert. den.*, 389 U.S. 1051 (1968), *mot. for leave to file pet. for rehearing den.*, ... U.S. ....., 89 S. Ct. 67 (1968), and *Houser v. O'Leary*, 383 F. 2d 730 (9th Cir. 1967), *cert. den.*, 390 U.S. 954 (1968).

The only decision to the contrary is that of the Fourth Circuit. Although the District Courts, in holding that the injuries in the cases at bar were not covered by The Longshoremen's Act, based their decisions in part on the fact that piers are extensions of the land; and although this point was emphasized in the briefs of the present petitioners, the stevedoring companies and the Government, it was not even mentioned, let alone discussed, in the opinion below. It is submitted that the only possible explanation is that the Fourth Circuit was unable to answer this argument, particularly since it had so held in two recent decisions. In *American Export Lines, Inc. v. Revel*, 266 F. 2d 82, 84 (1959), the Court of Appeals for the Fourth Circuit clearly stated the proposition which it now declines to espouse:

> "Since Revel was injured while standing on the dock, (an extension of the land) his remedies are restricted to those afforded by the local law. Swanson v. Marra Bros., 1946, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045; State Industrial Comm. v. Nordenholt Corp., 1922, 259 U.S. 263, 42 S. Ct. 473, 66 L. Ed. 933; Cf. The Longshoremen's and Harbor Workers' Compensation Act, 33

U.S.C.A. §903 and Kermarec v. Compagnie Generale Transatlantique, 1959, 358 U.S. 625, 79 S. Ct. 406, 3 L. Ed. 2d 550. This is true even though the Congress has embraced such cases within the maritime jurisdiction of the United States. Extension of Admiralty Act, 46 U.S.C.A. §740."

Later, in *Hastings v. Mann*, 340 F. 2d 910 (1965), *cert. den.*, 380 U.S. 963 (1965), a patron of a small boat marina was injured while using a launching ramp to float his boat. When the accident occurred, he was standing on the ramp in the navigable waters of Pamlico Sound. The Court of Appeals for the Fourth Circuit said at page 912 of 340 F. 2d:

"The fact that the libelant's feet were awash, when he slipped and fell on the ramp, does not alter the nature and character of the ramp or enlarge Admiralty's jurisdiction to award damages for injuries occurring upon it. . . .

". . . If his feet are awash, he is still standing upon an extension of the land in the same sense as is a worker upon a pier, who, when injured, is well seaward of both high and low water.

"We think the District Court properly concluded that, since the submerged portion of the launching ramp was firmly affixed to the land, it is an extension of the land, and the plaintiff's injury is not cognizable in Admiralty."

The majority below, in footnote 11 appearing in the Appendix at pages 52, 53, stated that to the extent its opinion deviated from its earlier opinion in *American Export Lines, Inc. v. Revel, supra*, the court felt that *Revel* had been overruled by *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1962). It is worthy of note that both *Revel* and *Hastings* held that a pier is an extension of the land and that *Hastings* was decided after *Calbeck*. It is therefore apparent that when the court below decided *Hastings* it did not at that time feel that the *Calbeck* decision, which

had been earlier decided by the Supreme Court, had decided anything to conflict with its view that a pier injury was anything other than a land injury; and the court below, nowhere in its opinion, goes so far as to maintain that a land injury is covered by the Longshoremen's Act.

A. *The Longshoremen's Act Has Always Been Held To Be Situs Oriented Rather Than Status Oriented.*

The divided Court of Appeals for the Fourth Circuit, in the decision below, erroneously concluded that coverage under the Longshoremen's Act depended upon status (that is, the workmen's occupation) rather than situs (the location of the injury).

In his strong dissent to the majority opinion below, Chief Judge Haynsworth said: ". . . [B]ut the 'status theory', as opposed to the 'situs theory', has been firmly rejected by every court that has ever considered it until now the majority embraces it . . ." (A. 61).

In only one instance did Congress extend the Longshoremen's Act to the land; that was in Section 3(a) in the case of any "dry dock". No other type dock or pier was or has been referred to and the distinction was commented upon in *Continental Casualty Co. v. Lawson*, 64 F. 2d 802, 304 (5th Cir. 1933). See the discussion in *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953), wherein Mr. Justice Douglas held that a marine railway was a dry dock within the meaning of the Longshoremen's Act.

II.

THE LEGISLATIVE HISTORY OF THE LONGSHOREMEN'S ACT MAKES IT CLEAR THAT PIER INJURIES WERE INTENTIONALLY EXCLUDED FROM THE COVERAGE OF THE ACT.

Before the passage of the Longshoremen's Act there were a number of decisions of this Court, between the years 1917

and 1924, which had held that state workmen's compensation acts could not constitutionally be applied to those workmen, longshoremen, who were injured while working on board ship or upon a gangway between a vessel and the pier. The leading case was *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), which held that state compensation acts could not cover an injury to a longshoreman which occurred on a gangplank between a pier and a vessel. Subsequent efforts of Congress to delegate to the states powers to pass such acts were struck down (*Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920); *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924)). As a result, the Longshoremen's Act was proposed and testimony as to what accidents the Act should cover and what its phraseology should be was given before the legislative committees to which the Act was referred. Some witnesses were anxious to have the Act cover accidents to longshoremen whether they occurred on the ship or on the land and such was stated to be "the earnest desire" of the Commissioner of Labor (Hearings on S. 3170, Senate Judiciary Committee, 69th Cong., 1st Sess., March 16 and April 2, 1926, p. 40; A. 18, 19), while others urged that the Act be limited to accidents to which state compensation acts could not constitutionally be applied.

The Longshoremen's Act, as originally introduced, contained a provision covering "any employment performed on a place within the *admiralty jurisdiction* of the United States, except employment of local concern and of no direct relation to navigation and commerce". (Senate Hearings, p. 2; emphasis supplied.) That language did not remain, however, and after considerable discusssion over the advisability of the "local concern" exception, the exception was omitted and the words "navigable waters" were substituted for the words "admiralty jurisdiction". Surely

there would have been no need for the substitution of one term for the other if Congress had considered the phrases synonymous (A. 21). S. Rep. No. 973, 69th Cong., 1st Sess., at page 16 states:

> "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen.' These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that *injuries occuring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship* so as to bring them within the maritime jurisdiction of the United States." (Emphasis supplied.)

Under these circumstances, Judge Watkins, in his decision in the District Court for the District of Maryland, held that "[c]overage of injuries occurring on the wharf was advertently omitted" and said that the "earnest desire" of the Commissioner of Labor was not realized (A. 19, 20). Messrs. Gilmore and Black reached the same conclusion, for they stated:

> "The exclusion of on-shore injuries to maritime employees otherwise within the Act may have reflected doubts as to Congressional power, in a statute passed under the Constitutional grant of admiralty jurisdiction to go beyond the highwater mark, or it may have been a policy decision to leave as much as possible to the state compensation commissions." (Gilmore & Black, The Law of Admiralty, page 339, 1957 Edition.)

Chief Judge Haynsworth put this forcefully in his strong dissent:

> ". . . The phrasing of the statute, as well as its history, shows a rejection, not an adoption, of the suggestion of the Department of Labor that the contract be covered rather than places. Had it been intended to adopt the contract theory, the statutory language 'on the navigable waters' could hardly have been more inap-

propriate for effectuation of that intention. The words, introduced as a substitution for the words, 'within the admiralty jurisdiction,' require a 'situs' approach, as all courts have held or assumed, not a 'status' approach" (A. 62).

This Court, in *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962), pointed out on four separate occasions that the Longshoremen's Act was only intended to cover injuries which occurred "on navigable waters". The Court said:

> "Our conclusion is that Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters (370 U.S. at 117).
>
> "There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; (370 U.S. at 120).
>
> "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, (370 U.S. at 124).
>
> "We conclude that Congress used the phrase 'if recovery . . . may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which Jensen, Knickerbocker and Dawson had rendered questionable the availability of a state compensation remedy" (370 U.S. at 126).

Judge Watkins commented that the Court used the term "on navigable waters" on eleven separate occasions in the body of the opinion and gave the page references (A. 30).

As Judge Watkins stated (A. 22) administrative interpretations of the Longshoremen's Act, while not controlling are certainly not without significance. Since the Act took

effect on July 1, 1927, the Bureau of Employees' Compensation of the United States Department of Labor has consistently interpreted the Act to leave wharfside injuries to state coverage. From time to time official opinions interpreting the Act have been published and in Opinion No. 16, September 30, 1927, (1927 A.M.C. 1855), the Commission administering the Act held that a longshoreman injured on a dock when struck by the ship's tackle in the process of loading a vessel, knocked from the dock onto the vessel, was not covered by the Longshoremen's Act but was instead covered by the state act. There are thirty-four such official opinions which are reprinted in 1927 A.M.C. 1550-1574, 1855-1860; 1928 A.M.C. 256-268, 404-425, 573 and 1929 A.M.C. 100.

The Department of Justice, in *every* case in which it has participated (including these consolidated cases) has taken the position that the Act does not cover injuries occurring on a pier.

III.

THE ADMIRALTY EXTENSION ACT OF 1948 DOES NOT ENLARGE THE COVERAGE OF THE LONGSHOREMEN'S ACT.

The respondent longshoremen and the majority below have erroneously injected the Admiralty Extension Act of 1948 into the case. They contend that Act, which enlarges the admiralty tort jurisdiction to certain injuries which occur ashore if caused by a vessel, has at the same time extended the coverage of the Longshoremen's Act to injuries which occur on land.

Chief Judge Haynsworth, dissenting below (A. 62, 63), succinctly summarized the legislative history of both the Admiralty Extension Act and the Longshoremen's act showing conclusively that the Extension Act was never intended

to supplement, enlarge or in any way amend the Longshoremen's Act:

> "... As Judge Watkins pointed out in one of the opinions from which these appeals come, no such intention is evident in the Admiralty Extension Act, its legislative history or the subsequent legislative history of the Compensation Act. The Admiralty Extension Act contains no reference to the Compensation Act, and five days after enactment of the Admiralty Extension Act the Compensation Act was amended to increase the benefits payable, but neither in that amendment nor in any of its legislative history is there any reference to the Admiralty Extension Act. Bearing in mind the initial deliberate choice of the Congress to substitute the words 'upon the navigable waters' as the definition of the covered injuries for the words 'within the admiralty jurisdiction,' as was first proposed in 1927 when the Compensation Act was enacted, a holding that the Admiralty Extension Act enlarged the scope of the Compensation Act appears a judicial ukase without legislative support." (References to footnotes are omitted.)

The Admiralty Extension Act cannot under any circumstances be considered an express amendment of the Longshoremen's Act as the Longshoremen's Act is not mentioned anywhere in the Extension Act. Moreover, a contemporaneous amendment of the Longshoremen's Act made no cross-reference to the Extension Act. The Extension Act was enacted on June 19, 1948, and on June 24, 1948, a bill to increase certain benefits under the Longshoremen's Act was enacted by the Congress (Public Law No. 757 [62 Stat. 602]). Had there been any intention on the part of the Congress to amend the Longshoremen's Act in any way, surely it would have been stated at some point in the legislative history.

In House Report No. 2287, 85th Cong., 2d Sess. (July 28, 1958), submitted ten years after the passage of the Ad-

miralty Extension Act, the Congressional understanding that injuries upon piers are not covered by the Longshoremen's Act is apparent:

> "The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U.S.C. 901 et seq.), provides compensation for injuries suffered by longshoremen, ship repairmen, ship service men and workers in related employment when they are working for private employers within the Federal maritime jurisdiction *on the navigable waters of the United States, including dry docks. These employees are subject to the protection of State safety standards when performing work on docks and in other shore areas.*" (Emphasis supplied.)

See Appendix, pp. 23, 24.

The express language of the Admiralty Extension Act is peculiarly inapplicable to a bill alleged to extend coverage under a workmen's compensation act. In relying upon the first paragraph of the Admiralty Extension Act the longshoremen below completely ignored the second, and in many respects more illuminating, paragraph. References therein to property damage and to suits *in rem* or *in personam* have no application to workmen's compensation proceedings, which are administrative in nature, and show that Congress had no intention of amending the jurisdiction requirement of the Longshoremen's Act. The Admiralty Extension Act was intended for the sole purpose of curing inequities arising when a vessel caused damage or injury on land by creating a new right to institute a suit in admiralty. See House Report No. 1523, 80th Cong., 2d Sess. (1948), 1948 U.S.C. Cong. Serv., Vol. II, pp. 1899-1900 and Appendix, pp. 27, 28.

Of the myriad of cases cited by the respondent longshoremen below and which will no doubt be cited in the brief subsequently to be filed in these proceedings in support of

their contention that the Admiralty Extension Act broadened the coverage of the Longshoremen's Act, most should be dismissed from consideration because they are not in point. The host of decisions concerning suits in admiralty for unseaworthiness by injured longshoremen are clearly distinguishable; the cause of action in unseaworthiness arises under the general maritime law, not under a limiting statute such as the Admiralty Extension Act. One case repeatedly and erroneously cited as supporting the contentions of the longshoremen's position calls for comment.

Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962), dealt with the question whether a court-made distinction that state compensation acts could constitutionally be applied to employees engaged in the completion of a launched vessel under construction on navigable waters, but not to employees engaged in repair work on completed vessels on navigable waters, was still valid after passage of the Longshoremen's Act so that men engaged in construction work injured on navigable waters were excluded from coverage under the Federal statute. In holding that the Longshoremen's Act applied, the Supreme Court in no way suggested that the phrase "navigable waters" in Section 903(a) did not mean exactly that. The injury in that case occurred on navigable waters. The Court recognized the Congressional intent when the Longshoremen's Act was passed to fill the *Jensen — Knickerbocker — Dawson* gap by providing compensation for injuries which had been judicially insulated from State coverage — on navigable waters. Several excerpts from the opinion support this conclusion:

> "There emerges from the complete legislative history a congressional desire for a statute which would provide federal compensation for all injuries to employees on navigable waters; in every case, that is, where Jensen might have seemed to preclude state compensation. . . ." 370 U.S. at page 120.

> "In sum, it appears that the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy. . . ." 370 U.S. at page 124.
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> "We conclude that Congress used the phrase 'if recovery . . . may not validly be provided by State law' in a sense consistent with the delineation of coverage as reaching injuries occurring on navigable waters. By that language Congress reiterated that the Act reached all those cases of injury to employees on navigable waters as to which Jensen, Knickerbocker and Dawson had rendered questionable the availability of a state compensation remedy." 370 U.S. at page 126.

There is nothing questionable about the availability to the longshoremen of a state compensation remedy.

The majority below has cited three cases which it feels read the *Calbeck* case as one which enlarges coverage under the Longshoremen's Act. Those cases are *Interlake S.S. Co. v. Nielsen*, 338 F. 2d 879, 882-883 (6th Cir. 1964); *Spann v. Lauritzen*, 344 F. 2d 204 (3rd Cir. 1965); and *Puget Sound Bridge & Dry Dock Co. v. O'Leary*, 260 F. Supp. 250 (W.D. Wash. 1966) (A. 52). It is submitted that the cases do not stand for the proposition for which they were cited by the court below.

Interlake S.S. Co. v. Nielsen, supra, involved a ship custodian who, in the course of his employment, drove his car off the end of the dock into Lake Erie, which was frozen, resulting in his death from a skull fracture. From an award of compensation under the Longshoremen's Act the vessel owner appealed on the sole ground that the fatal injury did not occur upon "navigable waters". In an opinion which made it abundantly clear that the situs of the accident was controlling, Judge Edwards, speaking for the court, concluded that there was no doubt the fatal injury did occur

upon navigable waters. He went on to find that there was also admiralty jurisdiction as the fatal injury occurred on navigable waters, the lake itself. There is no dispute that there can be coverage under the Longshoremen's Act where admiralty jurisdiction extends; but it is one thing to say that there *may* be Longshoremen's Act coverage where admiralty jurisdiction exists (for example on a vessel) and quite another thing to say that *whenever* there is admiralty jurisdiction there is coverage under that Act. All Judge Edwards stated was that there was admiralty jurisdiction, which is undisputed, and there was, in addition, coverage under the Act. That is all that was stated in *Calbeck*. Nowhere is there any suggestion in the decision that Longshoremen's Act coverage extends to a pier injury — quite the contrary, in fact. At page 882 of 338 F. 2d, Judge Edwards said:

> "While the Admiralty Extension Act of 1948 obviously was not designed directly to affect the Longshoremen's and Harbor Workers' Compensation Act, it did serve to make clear that admiralty jurisdiction could extend to damage caused on land by maritime events, although early case law had held to the contrary" (Citing cases).

Spann v. Lauritzen, supra, is likewise not in point. Spann, a longshoreman, was injured on the pier while engaged in unloading the vessel. The sole question involved was whether Spann had a right to sue the vessel for unseaworthiness and the case held that a longshoreman engaged in the traditional seaman's work of loading and unloading a vessel has a right of recovery for unseaworthiness even though his injury occurs on a pier. The case concerns itself only with expanding admiralty jurisdiction and not at all with the extent of the coverage of the Longshoremen's Act.

Puget Sound Bridge & Dry Dock Company v. O'Leary, supra, arose from the drowning of a workman when the shore crane in which he was working tipped over and fell into the water alongside the pier on which it was located. The Court found that there was coverage under the Longshoremen's Act because the injury and death by drowning occurred on navigable waters. Just as in *Interlake* above, the question was whether or not there should be Longshoremen's Act coverage when the injury occurred by falling into the water alongside a pier. The Court concerned itself solely with the situs of the injury which was in navigable waters. The case did not involve a pier injury which is the case before this Court.

The position taken by the majority below that the Longshoremen's Act is status oriented is totally inconsistent with its position that the Extension Act expands the coverage of the Longshoremen's Act. The Extension Act grants admiralty tort jurisdiction in those cases in which a vessel brings about damage to person or property "notwithstanding that such damage or injury be done or consummated *on land*". (Emphasis supplied.) How, in view of the quoted language, can there be any doubt that the Extension Act is anything but situs oriented? When the answer is unquestionably in the affirmative, how, then, can it seriously be contended that the Extension Act expands the coverage of the Longshoremen's Act?

The longshoremen and their counsel insist that the Longshoremen's Act should be construed to provide compensation for injuries occurring on a pier. If reasons of policy dictate that pier injuries should be covered by the Longshoremen's Act as well as those occurring on navigable waters, it is for Congress, not the courts, to effect the change by appropriate legislation. Congress has not done so and as this Court said in *Pillsbury v. United Engineering Co.*,

342 U.S. 197 (1952), in reference to the Longshoremen's Act:

> "We are aware that this is a humanitarian Act, and that it should be construed liberally to effectuate its purposes; but that does not give us the power to rewrite the statute of limitations at will, and make what was intended to be a limitation no limitation at all. . . . While it might be desirable for the statute to provide as petitioners contend, the power to change the statute is with Congress, not us." 342 U.S. at 200.

In his opinion in the case at bar, Judge Watkins said (A. 24, 25):

> ". . . What claimants then in effect are asking this court to do, advancing arguments almost identical to those urged in 1927 upon Congress (and rejected by it) to the effect that the Longshoremen's Act 'should cover the contract, cover the job and not simply the man when he is on the ship', is to hold that the Extension Act sub silentio by implication repealed in 1948 the coverage provisions of the Longshoremen's Act, twenty-one years after its original enactment, and re-enacted the coverage provisions with amendments so as to extend coverage to certain shoreside injuries not previously embraced within the Longshoremen's Act. To so hold would be but the grossest type of judicial legislation, an activity in which this court is not authorized to, and in any event declines to, engage."

Even if the Court should find that the Extension Act does enlarge the coverage of the Longshoremen's Act to include pier injuries, there would still be many longshoremen, injured on the pier, who were not covered by the Longshoremen's Act as their injuries might not be caused by a vessel on navigable waters as required by the Extension Act. For example, a longshoreman could trip and fall on a pier while gathering his working tools together awaiting the arrival of a ship expected momentarily. Such an

injury is obviously not caused by a vessel on navigable waters and the injured longshoreman would clearly be limited to compensation under the state law. (See Judge Watkins' footnote on the same point at A. 21.)

IV.

ANY EXTENSION OF LONGSHOREMEN'S ACT COVERAGE TO PIER INJURIES WOULD CREATE NEW TWILIGHT ZONES AND NECESSITATE ENDLESS LITIGATION.

It is undisputed that until the decision of the Court of Appeals for the Fourth Circuit below no case ever held that pier injuries were covered by the Longshoremen's Act. Since the passage of that Act in 1927 court after court has dealt with the area known as the "twilight zone".[2] The twilight zone is the area between the vessel and the pier, which in past years has required considerable litigation to determine just which locations were covered by the Federal Act and which were left to state compensation acts. Injuries occurring on gangways, brows, various means of ingress and egress to vessels from docks, skids and the like as well as those occurring in falls between the vessel and the dock have all been covered by extensive litigation. Now, some 41 years after the passage of the Act, judicial interpretation has drawn the twilight zone line as finely as it can be drawn. After years of litigation, there remains very little doubt in the minds of anyone which injuries are covered by the Federal Act and which by state compensation acts.

If pier injuries such as those sustained by Johnson, Klosek and Avery should suddenly be covered by the Federal Act, a multiplicity of new suits will ensue and the

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[2] See reference to "twilight zone" in *Travelers Insurance Co. v. Shea*, 382 F. 2d 344 at 346.

carefully drawn line which now circumscribes the twilight zone will be totally erased.

The majority below has referred to harsh and incongruous results when, for example, longshoremen in the same gang, one of whom may be working upon the vessel and another upon the pier, are injured by the same instrumentality. Judge Haynsworth, in his dissent (A. 64), discusses even greater incongruities if the majority opinion were adopted. For example, the majority has concluded that merely because there is some space beneath a pier, which may be upon pilings, for a rowboat, canoe or the like to worm its way, the waters are thus "navigable in fact" so that the injury actually did occur "upon the navigable waters of the United States." In addition to flying in the teeth of the now settled doctrine that a pier is an extension of the land the majority ignored the perfectly obvious fact that was covered and referred to in *Michigan Mutual Liability Co. v. Arrien*, 344 F. 2d 640 (2nd Cir. 1965), *cert. den.*, 382 U.S. 835 (1965), wherein the court stated at page 644:

> "A wharf or pier is usually built on pilings over what *was* navigable water. When the structure is completed, the water over which it is built is *permanently* removed from navigation as if the structure had been in the first instance built on land." (Emphasis in decision.)

On the identical point, assuming the decision of the majority below were followed, and based upon the observation that since water flowed beneath the pier the injury thus occurred upon navigable waters, imagine the confusion and ensuing litigation in those cases involving injuries to longshoremen working on a quay or wharf at the harbor's edge and beneath which no waters flow. As suggested by Judge Haynsworth, would a longshoreman be covered by the Act if he were working on that portion of a pier which is on the seaward side of high water but not covered if he

were on the shore side of the high water? Suppose the status theory were adopted. Would a longshoreman be covered wherever he was injured, several miles from the water, if he were on an errand to pick up supplies, even though under the Admiralty Extension Act he could not under any circumstances be entitled to admiralty tort jurisdiction as his injury was not caused by a vessel? Would a longshoreman be covered if his injuries were caused by a shore based crane engaged in loading the ship but not covered if he was struck by a switch engine moving empty freight cars? Not suggested by Judge Haynsworth but nevertheless a question which would involve considerable litigation arises — what would happen to a longshoreman injured on his way from one job to another while crossing a bridge, each end of which touched the land and the pilings of which were firmly embedded in the river bed? Is there any difference between the bridge and the pier except that it touches land at two ends rather than one? Is there any logical reason which suggests a bridge is not properly considered to be land just as piers have uniformly been so considered? The majority below, if consistent, would suggest otherwise.

The majority below cites a number of cases, just as have the longshoremen in prior proceedings, showing that the courts have held the language "upon navigable waters" has been used to give admiralty jurisdiction in instances which might appear questionable. For example, the court cites *D'Aleman v. Pan American World Airways*, 259 F. 2d 493 (2nd Cir. 1956) (A. 54) for injuries sustained by persons flying over the water. The reference however is inapposite as it has no connection whatever with the point here involved — the payment of compensation under the Longshoremen's Act.

Equally misplaced is the apparent support of the longshoremen's arguments by the court below in citing the Fifth Circuit case of *L'Hote v. Crowell*, 54 F. 2d 212 (1931), *rev'd on other grounds*, 286 U.S. 528 (1931), for the proposition that the injury to Klosek, who was knocked from the gondola car to the pier by the draft which struck him, was an injury occurring upon the "navigable waters", the point being that the injured man in *L'Hote*, like Klosek, when first lifted from the pier before the injury takes place, is in a different category from someone injured directly on the pier (A. 54).

The principle involved in *L'Hote* was covered by the Supreme Court in *The Admiral Peoples*, 295 U.S. 649 (1935). A passenger disembarking from a ship over its gangplank which projected above the dock fell from the shore end of the gangplank to the dock and was injured. The Court held that the gangplank was part of the vessel and the cause of action therefore arose while the injured party was still on the vessel although the actual physical injury was sustained on the dock. The Court cited the *L'Hote* case with approval. In *L'Hote*, a longshoreman, while riding a vessel's cargo sling from the wharf to the deck of the vessel suffered injuries when the sling struck the side of the vessel and precipitated him to the wharf. It was stated there at page 213 of 54 F. 2d that the longshoreman had "finished his work on the wharf and from the time he was lifted from it by the sling by means of the ship's tackle was under the control of an instrumentality of the ship." The facts in *L'Hote* and *The Admiral Peoples* are entirely different from the facts as related to Klosek who at no time was on the vessel, or any part of it, but was in a gondola car on the pier itself when he was struck by the draft. The initial impact in the *L'Hote* case occurred on the vessel. The impact in the Klosek case, as well as Johnson and Avery, clearly occurred on the pier.

CONCLUSION

For the reasons advanced:

1. Piers are extensions of the land; injuries occurring on them are not covered by the Longshoremen's Act as such injuries were not sustained upon navigable waters;

2. The Longshoremen's Act is situs, not status, oriented;

3. The legislative history of the Longshoremen's Act makes it clear that pier injuries were intentionally excluded from its coverage;

4. The Admiralty Extension Act of 1948 did not enlarge the coverage of the Longshoremen's Act;

5. The twilight zone should not be enlarged by extending the coverage of the Longshoremen's Act to the land;

the decision of the Court of Appeals for the Fourth Circuit should be reversed and that of the District Courts for the District of Maryland and the Eastern District of Virginia should be reinstated.

Respectfully submitted,

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